Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1998

DALE GUARINO
Petitioner

VERSUS

KAISER ALUMINUM &
CHEMICAL CORPRATION, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Can a state appellate court be permitted to change the legal standard upon which a jury verdict was based, reverse the verdict and give the litigant no opportunity to present evidence to meet that new standard?

2) Does such a procedure violate the Due Process Clause of the 14th amendment to the United States Constitution?

LIST OF ALL PARTIES TO THE PROCEEDING

Dale Guarino

Represented by Alonzo T. Stanga, III and William R. Mustian, III, Stanga & Mustian, P.L.C.

Kaiser Aluminum & Chemical Corporation and James LeBlanc

Represented by Albert Hanemann, Jr., Lemle & Kelleher

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OPINIONS RENDERED

The decision of the Fifth Circuit Court of Appeal for the State of Louisiana in this matter is found at the following citation: *Guarino v. Kaiser Aluminum & Chemical*, 712 So.2d 989 (La. App. 5th Cir. 1998)

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed was rendered by the Louisiana Supreme Court on October 30, 1998 when it denied relator's writ application to review the above described decision the Louisiana Fifth Circuit Court of Appeal.

(ii) No rehearing is permitted under the rules of the Louisiana Supreme Court when a writ application is denied therefore no request for rehearing was filed in the Louisiana Supreme Court.

(iii) The jurisdiction of this Court is based upon 28 USC 2106 and 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of the Section 1 of the Fourteenth Amendment to the United States Constitution, which states:

> "SECTION 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises out of an incident that occurred on August 4, 1994 at the Kaiser Aluminum plant in Gramercy, Louisiana. On that date, plaintiff Dale Guarino was working under a substitute foreman, James LeBlanc, because his regular foreman was on vacation. At the end of the shift that day, Guarino and LeBlanc became involved in a heated argument over where an impact gun should be stored. While the argument was ongoing, Guarino was holding the impact gun, which weighs approximately 18 pounds, on his right shoulder with his right hand gripping the gun and his arm in a flexed position. After Guarino told LeBlanc that he had been advised by his regular supervisor to store the gun in a certain place, LeBlanc angrily exclaimed an obscenity, walked to the side of Guarino and forcibly grabbed the heavy impact gun off of Guarino's shoulder, (without Guarino's consent) wresting it from his grip. As a result, Dale Guarino sustained serious shoulder injuries.

As a result of this violent battery, Dale Guarino had to undergo shoulder surgery in January 1995. He was unable to return to work at Kaiser until February 1996, missing approximately 18 months of work. When he did return to work, he did so with permanent restrictions and his job had to be modified to accommodate these restrictions. This young man (33 at the time of trial) now has permanent loss of strength and restricted use of the right arm.

Guarino filed suit against LeBlanc and Kaiser in state district court based upon Louisiana Supreme Court precedent in *Caudle v. Betts,* 512 So.2d 389 (La. 1987) which allows suits for battery committed by supervisors upon employees

without proof of intent to cause harm; the plaintiff need only prove intent to commit a battery and resulting injury. 512 So.2d at 391. The case was tried before a jury in St. James Parish. The jury returned a verdict in favor of plaintiff, Dale Guarion, and against the defendants, Kaiser Aluminum and Chemical Corporation and James W. LeBlanc, awarding damages for past, present and future pain and suffering in the amount of $230,000.00, for past, present and future mental anguish in the amount of $25,000.00, and for past lost wages in the amount of $45,000.00, for a total award of $300,000.00.

From this judgment Kaiser and LeBlanc appealed. On May 13, 1998, the Court of Appeal rendered a decision reversing the jury verdict. An application for rehearing was filed on May 26, 1998. The application for rehearing was denied on June 17, 1998. Guarino then filed a petition for writ of certiorari with the Louisiana Supreme Court which was denied by order dated October 30, 1998.

The action of the Louisiana Fifth Circuit Court of Appeal in reversing the jury verdict violated Dale Guarino's due process rights under the 14th amendment in that the Court of Appeal reversed and rendered the jury verdict by employing a different legal standard than had been given the jury by the trial court in its charge to the jury. The defendants had not objected to the trial court's charge to the jury. In announcing a new legal standard at variance with the jury charge (which had been based upon the Louisiana Supreme Court decision in *Caudle*), the Court of Appeal should have remanded the case for trial in accordance with that standard. By reversing and dismissing the case, the Court of Appeal denied petitioner the opportunity to put on evidence, which

might satisfy this new legal standard. The failure to give petitioner this opportunity deprived petitioner of his procedural due process rights under the 14th amendment.

Jurisdictional Considerations

This constitutional issue of course did not arise until the Court of Appeal had rendered its decision reversing the jury verdict. Both on petition for rehearing with the Court of Appeal and upon writ application to the Louisiana Supreme court, petitioner argued that the action of the Court of Appeal was "fundamentally unfair":

> "If *Caudle v. Betts* is not the applicable law and if the jury charges can be at issue on appeal despite no objection by defendants, then, out of fundamental fairness, this matter should be remanded so that a jury can consider this evidence based upon the new (non-Caudle) legal standard enunciated by the Court of Appeal in this case. Any other approach would be unfair as acknowledged by the Fifth Circuit in *Guillie,* supra." (Writ application to Louisiana Supreme Court, p. 23)

While petitioner did not specifically use the words "due process" in this assignment of error before the Louisiana Supreme Court, the plea for "fundamental fairness" articulated the notion of due process. This Court has previously entertained petitions for Certiorari where the federal constitutional issue was not raised at the state court level with precision. For instance, in *Wood v. Georgia,* 101 S.Ct. 1097 (1981) this Court remanded the case to state court for a determination of constitutional violations even though no constitu-

tional issue had been raised at the state court level. In so doing, this Court stated:

> "Where, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue." 101 S.Ct. at 1100.

In footnote 5 of the *Wood* opinion, this Court noted that 28 USC 2106 authorizes remand in the interests of justice and further stated that such review is appropriate where this Court "...feels the error is so serious as to constitute a fundamental unfairness in the proceedings." *Wood*, supra, n. 5, 101 S.Ct. at 1100. This Court has also granted remand where a constitutional issue was plain upon a review of the record although not raised at the state court level in *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Moreover, this Court has held in the past that "magic words" are not necessary in order for a constitutional claim to have been properly set forth. The focus should be on how the state court action has impacted the constitutional rights sought to be enforced. As this court noted in *People of State of New York ex rel. Bryant v. Zimmerman*, 49 S.Ct. 61 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this

was done, the claim is to be regarded as having been adequately presented.

Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." 49 S.Ct. at 63.

The due process violation in this case is evident. This Court has the authority and jurisdiction pursuant to both 28 USC 2106 and 28 USC 1257 to remand this matter to the Louisiana Supreme Court for consideration of this significant due process issue. This Court has recently favored the "GVR" for issues of this type, noting that 28 USC 2106 "confer[s] upon this Court a broad power to GVR" *Lawrence v. Chater,* 516 U.S. 163,166 (1996).

While this Court has never decided whether the requirement that a federal claim be addressed or properly presented in state court is "jurisdictional or prudential", *Adams v. Robertson,* 117 S.Ct. 1028, 1031 (1997), this Court has made clear that the authority to remand under 28 USC 2106 should be used when the integrity of the judicial process so demands. *United States v. Shotwell Manufacturing Co.,* 78 S.Ct. 245, 250-251 (1957) This is such a case..

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Due Process Clause of the Fourteenth Amendment to the United States Constitution has been interpreted on numerous occasions by this Honorable Court to require that

state courts in civil actions must afford to each litigant "a proper opportunity to present his evidence". *Saunders v. Shaw,* 244 U.S. 317, 319 (1917) Cf. *Western & Atl. R.Co. v. Henderson,* 279 U.S. 639 (1929); *Armstrong v. Manzo,* 380 U.S. 545 (1965); *Mullane v. Central Hanover, Bank & Tr. Co.,* 339 U.S. 306 (1950)

Of the cited cases, *Saunders v. Shaw,* 244 U.S. 317 (1917) presents the situation most analogous to that in the instant case. In *Saunders,* as here, the appellate court judged the trial court judgment on a different legal standard than was used at the trial court level. The litigant in *Saunders* had been precluded from offering evidence in conformity with that standard at trial and was not given the opportunity, by way of remand, to comply with the new legal standard announced on appeal. This court held such a procedure to violate the Due Process Clause of the 14th amendment.

Similarly, in the instant case, the trial court jury was charged with the applicable law based upon the Louisiana Supreme Court's decision in *Caudle v. Betts,* 512 So.2d 389 (La. 1987) without objection by the defendants. (See excerpt of pertinent portion of trial court jury charge at Appendix C) Thus, the jury's verdict was clearly based upon its determination that petitioner had met the elements of proof required in *Caudle.* Significantly, that case and the charge to the jury specifically state that plaintiff need not prove any intent to harm but only an intent to commit a battery and resulting injury. *Caudle,* supra, 512 So.2d at 391; Jury charge, Appendix C.)

The Fifth Circuit Court of Appeal, however, attempted to distinguish *Caudle* and held that petitioner was required to prove that his supervisor LeBlanc intended to injure him at the time of the incident or that he was "substantially certain" that his actions would injure petitioner:

> " In the case before us, there is no evidence to suggest, much less to establish by a preponderance of the evidence, that LeBlanc actually intended to injure Guarino. Further, a reasonable man would not have believed that grabbing a tool out of someone's hand would be substantially certain to cause injury. Thus, neither prong of the intentional tort analysis has been met in this case. That being so, Guarino's sole remedy under La. R.R. 23:1032, lies in workers' compensation." 712 So.2d at 992

This holding by the Court of Appeal represents a radical departure from the proof required by the Louisiana Supreme Court in *Caudle v. Betts* for cases of battery which occur on the job. Other than a minor difference in facts, *Caudle* is not distinguishable from this case. In *Caudle,* the Louisiana Supreme Court clearly stated that **the relevant intent in a battery case *is not the intent to injure but rather the intent to inflict either a harmful or offensive contact without the other's consent*:**

> *"The intention need not be malicious nor need it be an intention to inflict actual damage.* it is sufficient if the actor intends to inflict either a harmful or offensive contact without the other person's consent."

(emphasis added)

512 So. 2d at 391.

Further explaining the standard of liability for battery, the Court stated:

> "The element of personal indignity involved always had been given considerable weight. Consequently, the defendant is liable not only for contacts that do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting."

512 So. 2d at 389.

The Court went on to further explain:

> "The intent with which tort liability is concerned is *not necessarily a hostile intent, or desire to do any harm.* Restatement (2d) of Torts, American Law Institute Section 13, (Comment e) (1965). ***Rather it is an intent to bring about a result which will invade the interest of another in a way that the law forbids.*** The defendant may be liable although intending nothing more than a good natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good." (emphasis added) 512 So.2d at 391.

The foregoing is the correct statement of law applicable to this case and, when properly applied to this case, leaves no reasonable conclusion other than the fact that this jury verdict should have been affirmed.

As the Louisiana Supreme Court explained in *Caudle,* there is a balancing of interests behind the policy, which

allows a tort action in this situation:

> "It is undisputed that when Mr. Betts shocked the employee, Mr. Caudle, with the condenser, he intended the contact to be offensive and at least slightly painful or harmful. The fact that he did so as a practical joke and *did not intend to inflict actual damage does not render him immune from liability.* Further, as between the innocent employee victim and the wrongdoer, it is better for unexpected losses to fall upon the intentional wrongdoer. *Mr. Caudle is entitled to recover for all consequences of the battery, even those that Mr. Betts did not intend and could not reasonably have foreseen.*" (emphasis added)

512 So.2d at 392.

The Court of Appeal's, conclusion that petitioner was required to prove that LeBlanc intended injury or even that he was substantially certain that an injury would occur is obviously a major departure from established precedent.

Its decision clearly established a much more stringent evidentiary burden than was required of petitioner by the trial court.

Clearly, petitioner has never been given the opportunity to put on evidence of intent as it was not required by the trial court since the trial court relied upon the Louisiana Supreme Court precedent in *Caudle.* The defendants were permitted by the Court of Appeal to appeal a jury charge they did not object to and were granted a dismissal of petitioner's case

and reversal of the jury verdict without petitioner ever being given any opportunity to meet the new standard imposed by the Court of Appeal. This is the type of deprivation of the "proper opportunity to present his evidence" this Court has held violative of due process. *Saunders v. Shaw*, 244 U.S. 317, 319 (1917)

CONCLUSION

This case presents an important constitutional and policy issue: Can a state appellate court be permitted to deprive a litigant of his due process rights by changing the legal standard upon which a jury verdict was based and give the litigant no opportunity to present evidence to meet that new standard? This Court's precedent, the Due Process Clause of the 14th amendment and considerations of fundamental fairness say that this cannot and should not happen. It is respectfully submitted that this petition should be granted and that this matter should be remanded to the Louisiana Supreme Court for consideration of this important due process issue.

APPENDIX A

DALE GUARINO	NO. 97-CA-926
VERSUS	COURT OF APPEAL
KAISER ALUMINUM & CHEMICAL & JAMES LEBLANC	FIFTH CIRCUIT
	STATE OF LOUISIANA

APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JAMES, NO. 23310, DIVISION "A", HONORABLE GLYNN LONG, JUDGE

: : :

EDWARD A. DUFRESNE, JR.
JUDGE

MAY 13, 1998

: : :

(Panel composed of Judges Charles Grisbaum, Jr., Edward A. Dufresne, Jr., Thomas C. Wicker, Jr., James L. Cannella and Thomas F. Daley)

CANNELLA, J., DISSENTS

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JUDGMENT VACATED,
MATTER DISMISSED.

This is an appeal by Kaiser Aluminum & Chemical Corporation and James LeBlanc, defendants-appellants, from a $300,000.00 jury verdict in a suit by Dale Guarino, a Kaiser employee. Guarino claimed to have been injured on the job by an intentional act on the part of LeBlanc, his temporary shift foreman, thus permitting him to assert a tort action as per La. R.S. 23:1032. Because we determine that the evidence presented, even when taken in a light most favorable to plaintiff, does not establish as a matter of law that an intentional tort was committed, we must set aside the judgment.

The appellants submit here that they do not challenge plaintiff's version of the basic facts of the incident giving rise to this litigation. Instead, they contend that even taking those facts to be true plaintiff has not established an intentional tort. We thus proceed with those propositions in mind.

Dale Guarino is an employee of Kaiser Aluminum at its refining plant in St. James Parish. On the day in question, his regular shift foreman, Raymond Gros, had been temporarily replaced by James LeBlanc. At the end of his shift, Guarino returned to the tool locker area with an impact wrench, a twelve to eighteen pound hand tool, with an air hose attached to it. As he was standing in front of one of the lockers, LeBlanc approached him and asked for the wrench, apparently believing that it was his. Guarino refused to hand over the tool, even though it did have LeBlanc's name on it. He explained to LeBlanc that Gros, the regular foreman, had given his crew specific instructions to return all tools used on their shift to their shift's designated tool locker. Guarino testified that he was holding the tool in his hand, which was in turn just above his shoulder, with the hose dangling off of an outstretched finger. At that point, LeBlanc said

"F_____ Raymond Gros," and grabbed the tool out of Guarino's hand. Guarino contended that the action was so quick that he did not have time to release his grip on the tool and that his arm was twisted as LeBlanc pulled it away. This in turn resulted in an injury to his rotor cuff which eventually required surgery to repair.

Guarino gave the most detailed explanation of the incident on cross-examination, as follows:

Q. And when you were demonstrating earlier how you were carrying this wrench, it was my impression that you had it kind of propped up on your shoulder.

A. Yes.

Q. Holding it in your hand.

A. More or less balancing it with my hand.

Q. All right. So you were kind of balancing it up on the shoulder, and you had both the coil and the wrench itself up on your shoulder?

A. I had the hose coiled around one of my fingers sticking out.

Q. You didn't have the coil wrapped around your arm?

A. No.

Q. Or your shoulder?

A. No.

Q. It was just resting there?

A. It was resting on the finger or whatever.

Q. Was it attached in any way to your body or to your clothing?

A. I would not think so.

Q. You didn't have any kind of strap or a pen [sic.] or anything like that holding it there?

A. No.

Q. Now, your testimony is that Jimmy LeBlanc removed the gun, the impact wrench from your shoulder?

A. Yes, without a doubt.

Q. And you can't really say how he did it or what happened?

A. I wasn't facing the man. I didn't see him coming. He hit me blind sided.

Q. So you don't really know how he did it?

A. All I know is the wrench was on my shoulder and then it wasn't on my shoulder.

Q. And it just happened that fast?

A. Right, it was a fast action.

Q. Did you fall down?

A. No.

Q. Did you get pulled back into the locker?

A. I don't recall getting pulled back. I don't know.

Q. Did you get jerked on one side or the other?

A. Not that I recall. I don't know. It was a fast action.

Q. You don't really know what happened to your body in this incident, do you?

A. I know the impact wrench was on me and then it wasn't on me.

Q. Suddenly it was gone.

A. Yes.

Q. And you can't explain it better than that.

A. Well, milliseconds after it happened Jimmy had the wrench in his hand, and I told him don't ever do that again, and he said I should have let it go. So that showed me that he took it from me. And there was no one else present.

Q. Did LeBlanc grab any part of your body?

A. No.

Q. So the only thing he touched, as far as you know, is the impact wrench itself)

A. As far as I know, that is all he touched. It was a real quick sudden jerk movement, whatever it was I don't know. It was quick whatever happened.

As urged by the defendants, we accept Guarino's version of the incident as presented in this testimony. The question, then, is whether this evidence is sufficient to established commission of an intentional tort by LeBlanc.

In *White v. Monsanto Co.*, 585 So.2d 1205, 1208 (La. 1991), the court set forth the law concerning "intentional acts" in the workers' compensation context, as follows:

> LSA-R.S. 23:1032 makes worker's compensation an employee's exclusive remedy for a work-related injury caused by a co-employee, except for a suit based on an intentional act. The words "intentional act" mean the same as "intentional tort." The legislative aim was to make use of the well-established division between intentional torts and negligence in common law. The meaning of intent is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result. Thus, intent has reference to the consequences of an act rather than to the act itself. Only where the actor entertained a desire to bring about the consequences that followed or where the actor believed that the result was substantially certain to follow has an act been characterized as intentional. *Bazely v. Tortorich, 397 So.2d 475 (La. 1981).*

We further note that the "subtantially certain" language has reference to what a reasonable man in a defendant's position would believe. W. Prosser, Law of Torts, § 8 (4th ed. 1971).

In the case before us, there is no evidence to suggest, much less to establish by a preponderance of the evidence, that LeBlanc actually intended to injure Guarino. Further, a reasonable man would not have believed that grabbing a tool out of someone's hand would be substantially certain to cause injury. Thus, neither prong of the intentional tort analysis has been met in this case. That being so, Guarino's sole remedy under La. R.S. 23:1032, lies in workers' compensation.

Guarino cites *Caudle v. Betts, 512 So.2d 389 (La. 1987)* in support of his argument that an intentional tort was committed by LeBlanc. We find that case factually dissimilar, however. There, the president of a corporation shocked an employee on the neck with an automobile condenser, and caused severe nerve injury. The defense asserted that because the tortfeasor did not intend to cause an injury of the severity that actually resulted, no intentional tort had been committed. There was no question in the case that the tortfeasor intended to harm the plaintiff, and although he may not have intended to harm his so badly, a tortfeasor nonetheless takes his victim as he finds him.

That is not the circumstance here. The evidence simply does not establish that LeBlanc intended any injury whatsoever, and further, a reasonable man would not have anticipated that any injury would result from the act. In these circumstances we can only conclude that no intentional tort was committed.

For the foregoing reasons, we vacate the judgment of the district court in plaintiffs favor, and dismiss the matter.

JUDGMENT VACATED,
MATTER DISMISSED.

DALE GUARINO	FIFTH CIRCUIT
VERSUS	COURT OF APPEAL
KAISER ALUMINUM & CHEMICAL & JAMES LEBLANC	STATE OF LOUISIANA
	NO. 97-CA-926

CANNELLA, J., DISSENTS.

I would affirm the jury verdict in this case for the following reasons.

When an employee seeks to recover from his employer for an intentional tort, a court must apply the legal precepts of general tort law related to the particular intentional tort alleged, in order to determine whether he has proved his cause of action and the damages recoverable thereunder. *Caudle v. Betts,* 512 So.2d 389, 391 (La.1987); *Stewart v. Parish of Jefferson,* 95-407 (La. App. 5th Cir. 1/30/96), 668 So.2d 1292, 1294.

In *Caudle v. Betts,* 512 So.2d 389 (La. 1987), the Louisiana Supreme Court held that a battery was an intentional tort for purposes of the workers compensation act. There, the court found that an intentional battery had occurred when plaintiff's employer's principal owner and chief executive officer intentionally touched and shocked the plaintiff with an auto condenser as a practical joke. The court stated:

A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact, is a battery... The intention need not be malicious nor need it be an intention to inflict actual damage. It is sufficient if the actor intends to inflict either a harmful or offensive contact without the other's consent. (Citations omitted)

The original purpose of the courts in providing the action for battery undoubtedly was to keep the peace by affording a substitute for private retribution. F. Stone, *Louisiana Civil Law Treatise. Tort Doctrine.* § 125 (1977). The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contacts that do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting. W. Prosser and W. Keeton, *The Law of Torts,* § 9 (5th ed. 1984); *Harrigan v. Rosich,* 173 So.2d 880 (La. App. 4th Cir. 1965).

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm... Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good. (Citations omitted)

Bodily harm is generally considered to be any physical impairment of the condition of a person's

body, or physical pain or illness... The defendant's liability for the resulting harm extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim. (Citations omitted)

Caudle v. Betts, 512 So.2d at 391-392..

Likewise, in *Villa v. Derouen,* 614 So.2d 714 (La. App. 3 Cir. 1993), a co-employee pointed a welding cutting torch in plaintiff's direction and intentionally released oxygen or acetylene gas that caused unintentional harm to plaintiff in the form of burns to his groin area. In that case, the Third Circuit stated that to constitute a battery, defendant need only intend that the oxygen be sprayed toward the plaintiff come into contact with him or that he have knowledge that this contact was substantially certain to occur.

The *Caudle* case is the authority for the facts in this case. This was a intentional battery. Under *Caudle,* the jury did not err in finding that the intentional tort exclusion to the worker's compensation act applies. Thus, I would affirm that portion of the judgment. I would reduce the damages.

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

DALE GUARINO

VS. NO. 98-C - 1893

KAISER ALUMINUM & CHEMICAL
& JAMES LEBLANC

IN RE: Guarino, Dale; - Plaintiff(s); Applying for Writ of Certiorari and /or Review; to the Court of Appeal, Fifth Circuit, Number 97-CA-0926; Parish of St. James 23rd Judicial District Court Div. "A" Number 23,310

October 30, 1998

Denied.

JPV

WFM

CDK

BJJ

CDT

JTK

CALOGERO, C.J. would grant the writ.

LEMMON, J. not on panel.

Supreme Court of Louisiana
October 30, 1998

/s/ Illegible

Clerk of Court
For the Court

APPENDIX C

The following is the jury charge which was given by the Court to the jury with reference to liability for battery:

> "The law appapplicable3 [sic] to the plaintiff's claim depends on the nature of that claim. In this case, the suit is seeking damages for injury caused by the intentional act of another. Furthermore, an employer is liable for injuries sustained by its employees in the course of employment only if those injuries are caused by an intentional act of the employer or of a fellow employee.
> *It is not necessary for the plaintiff to prove the defendant's intent was malicious or that the defendant intended to inflict actual damages.* It is sufficient if the plaintiff proves that the defendant intended to inflict harmful or offensive contact without plaintiff's consent, and that this contact resulted in harm for plaintiff.
>
> The defendant is *liable* for the intentional use of force on another *even if the results or consequences which were not intended or foreseen by the defendant occurred.*
>
> Therefore, in this case, if you find the defendant, James W. LeBlanc intentionally used force or violence during the course and scope of his employment, then the defendant, Kaiser Aluminum and Chemical Corporation as LeBlanc's employer is also liable for damages resulting from that contact.
>
> An intentional use of force or violence on another may be accomplished through some object held by

> or on the person of the victim. Therefore, in this case, to recover for an injury, Dale Guarino must prove by a preponderance of the evidence the following: One, James W. LeBlanc committed an intentional act against the plaintiff, Dale Guarino, that is, he intentionally used force or violence on Dale Guarino either directly or through some object on his person; and second, that the injury which Dale Guarino says he suffered was, in fact, incurred and caused by the defendant, James W. LeBlanc. By consent of all concerned, it is not necessary for you to address the issue of within the course and scope of employment."

(Record, p. 1011, lines 4-25; p. 1012, lines 1-18) (emphasis added)